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Supreme Court of the United States

RODNEY REID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the Center on the Administration of Criminal Law (the "Center"), respectfully submits this brief in support of the petition for *certiorari*. The Center is dedicated to defining and promoting best practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. The Center's litigation program seeks to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts.

SUMMARY OF ARGUMENT

The Court should grant the petition for *certiorari* in order to resolve a clear conflict among the federal circuits on the important and recurring issue of whether the Confrontation Clause guarantees a criminal defendant the right to cross-examine an adverse government witness regarding the sentence the witness would have faced absent his cooperation with the government. In the case below, the Second Circuit joined the First and Fourth Circuits, which have held that the Confrontation Clause does not

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice, at least 10 days prior to the due date, of the Center's intention to file this brief. All parties have consented to the filing, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

guarantee such a right; these courts have reasoned that the defendant's interest in demonstrating bias is outweighed by a judicially-created policy against permitting the jury to learn the potential sentence faced by the defendant—information that might be revealed if the accomplice testifies to his potential sentence. *See United States v. Reid*, No. 08-0134-cr (2d Cir. Nov. 12, 2008). (A61-62.) These decisions directly conflict with decisions of the Third, Fourth (in an intra-circuit split), Fifth, and Ninth Circuits, which have held that the Confrontation Clause, as interpreted in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), gives defendants the right to confront witnesses concerning the specific penalties they would have faced absent government cooperation.

This split in the circuits concerns an issue of great importance to the fairness and integrity of criminal trials. As the decisions in the Third, Fourth, Fifth, and Ninth Circuits have recognized, the details of a government witness's cooperation with the government—and in particular the benefits the witness will obtain by testifying against the defendant—are highly probative of the credibility and bias of the cooperating witness, and thus are at the core of the protections the Confrontation Clause was intended to provide. The only rationale offered for the contrary rulings of the First, Fourth, and now Second Circuits is the concern that juries might be able to tell from the sentence that a cooperating witness avoided what sentence the defendant faces, and with that knowledge might nullify the verdict.

But a judicially-created prophylactic rule aimed at limiting nullification cannot outweigh a defendant's constitutional right to confront a witness regarding bias and motive to lie. While the Court in *Van Arsdall*

recognized that trial judges could impose "reasonable limits" on cross-examination, it made clear that it was not reasonable for a trial court to prohibit "*all* inquiry" into a factor that could suggest bias and that the "jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." 475 U.S. at 679 (emphasis in original). Yet the First, Second, and Fourth Circuits have done precisely that with their absolute bar on allowing defendants to cross-examine government witnesses about the sentencing relief they received in exchange for their testimony. It is hardly a "reasonable limit[]" to preclude a defendant entirely from asking a witness about his or her deal with the government when the avoidance of punishment is precisely the kind of motive that is at the core of the Confrontation Clause.

The history of the Confrontation Clause and the jury guarantee makes clear that the judicial policy against nullification cited by the First, Second, and Fourth Circuits cannot outweigh the constitutional right to confront witnesses about potential bias. The Petition details the longstanding right of a criminal defendant to confront the government's witnesses with any benefits they may have received in exchange for testifying. (Pet. 16-19.) The jury's power to apply the law to the facts, which, in turn, gives it the power to nullify, also is longstanding. Indeed, at the time of the Framing, the historical practice was that juries were advised not just of a witness's potential sentence, but also of the sentence faced by the defendant, precisely so that the jury would have the option of downgrading or nullifying a verdict that it perceived to be too harsh. This practice makes clear that there is no historical policy against nullification that can be weighed against the core Confrontation Clause right at issue here. On the contrary, the jury historically was

thought to serve as a valuable check against the powers of courts and prosecutors.

This checking role for the jury continues to be central to our system of criminal justice today, as evidenced by many of this Court's decisions. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995).

In stark contrast to this well-established constitutional right of a defendant to cross-examine witnesses about bias are the relatively recent, judicially-created rules in some circuits that are designed to prevent jurors from learning about a defendant's potential sentence upon conviction. These prophylactic rules have no basis in the Constitution's text, in historical practice, or in policy. Accordingly, they must yield to a defendant's constitutional rights.

For these reasons, the Court should grant the Petition and reverse the judgment of the Second Circuit.

ARGUMENT

I. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER A CRIMINAL DEFENDANT HAS A RIGHT UNDER THE CONFRONTATION CLAUSE TO CROSS-EXAMINE A GOVERNMENT WITNESS REGARDING THE SENTENCES THE WITNESS WOULD HAVE FACED ABSENT COOPERATION

There is a conflict in the federal circuits over whether the Confrontation Clause, as construed by this Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), guarantees a criminal defendant the right to

cross-examine a government witness regarding the sentence the witness would have received but for his cooperation. In *Van Arsdall*, the Court held that a criminal defendant has a right under the Confrontation Clause to cross-examine a government witness regarding the benefits the witness obtained in exchange for testifying against the defendant. *Id.* at 679. The defendant had been convicted of murder in Delaware state court. *Id.* at 674. During trial, the court prohibited the defendant from cross-examining a prosecution witness about the terms of the witness's agreement with the government, which included dismissal of a pending misdemeanor charge in exchange for the witness's cooperation. The Delaware Supreme Court reversed the conviction, holding that the order precluding cross-examination violated the Confrontation Clause. *Id.* at 678.

This Court granted *certiorari* and affirmed the finding of constitutional error. The Court held that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from conducting cross-examination designed to demonstrate "a prototypical form of bias" on the part of the witness, and thereby "'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Id.* at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). The Court held that the trial court, by "cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony," violated the defendant's rights "secured by the Confrontation Clause." *Id.* at 679.

Four circuits—the Third, Fourth, Fifth, and Ninth—

have held that, under *Van Arsdall*, the Confrontation Clause gives a criminal defendant the right to cross-examine a government witness regarding the sentence the witness avoided by cooperating with the government.

By contrast, the First and Fourth (in an intra-circuit split), and now the Second Circuit, have found against such a right, relying on the theory that any right of confrontation is outweighed by the risk that the jury, if advised of the witness's potential sentence, might deduce the defendant's potential sentence and, based on that knowledge, engage in nullification.

A. The Circuits That Have Permitted Cross-Examination Have Recognized That the Right to Examine a Government Witness As to the Witness's Avoided Sentence Implicates the Core Concerns of the Confrontation Clause

The Third, Fourth, Fifth, and Ninth Circuits have held that under *Van Arsdall*, the defendant has the right to elicit testimony with respect to the *specific* sentence the government's witness has avoided by cooperating with the government. These courts have rejected government arguments that a defendant's Confrontation Clause rights can be satisfied by advising the jury of the existence (but not the terms) of a plea agreement with the government in exchange for a witness's testimony. Moreover, two circuits—the Third and Ninth—explicitly reject the argument that policy concerns about jury nullification outweigh any Confrontation Clause right.

In *United States v. Chandler*, 326 F.3d 210 (3d Cir. 2003), the defendant was convicted of participation in a drug-distribution conspiracy. *Id.* at 213. The

government called multiple members of the conspiracy to testify against the defendant. One of the witnesses testified on direct examination that he had sold roughly five kilograms of cocaine, and that under his agreement with the government, he was permitted to plead guilty to selling only three kilograms. *Id.* at 221. On cross-examination, he further acknowledged that pursuant to his plea agreement, the government had filed a motion urging a downward departure of his sentence. *Id.* The trial court, however, precluded defense counsel from eliciting from the defendant the fact that, absent his cooperation, he would have faced a sentence of between 97 and 121 months under the Sentencing Guidelines (approximately 8-10 years)—as distinguished from the relatively modest sentence he actually received. *Id.* at 221-22. Another witness in the same case testified that she had pled guilty to trafficking 15 to 50 kilos of cocaine. *Id.* at 222. Although the witness testified that she expected a downward departure for her cooperation, the court precluded defense counsel from inquiring into the specifics of this potential benefit, which amounted to avoidance of a sentence of between 151 and 188 months (approximately 12-15 years). *Id.*

Relying upon *Van Arsdall*, the Third Circuit reversed and remanded for a new trial. *Id.* at 224-25. The court had "little difficulty" concluding that a reasonable jury could have reached a significantly different impression of the credibility of the witnesses if it had known of the "enormous magnitude of their stake" in testifying against the defendant. *Id.* at 222. The court noted that the witnesses' mere acknowledgment that they would receive an unspecified benefit from the government was insufficient for the jury to appreciate the strength of their motive to provide testimony favorable to the

prosecution. *Id.* In comparison to the relatively modest benefit of the dismissal of the misdemeanor in *Van Arsdall*, the witnesses had received or expected a "benefit of far greater magnitude through [their] cooperation." *Id.* at 222. For these reasons, the court held that the district court violated the defendant's right to cross-examine the witnesses about facts that the court concluded bore directly on the jury's consideration of the weight, "if not the fact," of their motive to testify against the defendant—"facts, that is, which would have underscored dramatically their interest in satisfying the government's expectations of their testimony." *Id.*

The Third Circuit considered and rejected the risk of jury nullification purportedly resulting from such cross-examination. The court stated that, although it appreciated the government's interest in withholding information that might induce a jury to nullify the federal law that the defendant was accused of violating, such an interest was "outweighed" by the defendant's "constitutional right to confront" the witnesses against him. *Id.* at 223.

The Ninth Circuit reached a similar result in *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (en banc). There, the defendant was convicted of conspiring to distribute methamphetamine. *Id.* at 1099. The trial court allowed defense counsel to question a government witness and co-conspirator about a potential reduction in his sentence, but prohibited counsel from eliciting the fact that the witness would have faced a minimum life sentence had he not cooperated. *Id.* at 1104-05. The Ninth Circuit in an en banc decision held that this was error. *Id.* at 1108-09. Citing *Van Arsdall* and *Chandler*, the court reasoned that a cooperating witness who faces a

statutorily mandated life sentence unless the government seeks a reduction of the sentence has a compelling incentive to testify in a manner favorable to the government. *Id.* at 1104. The court noted that the mandatory nature of the potential sentence, the length of the sentence, and the witness's strong motive to avoid such a sentence "cast considerable doubt on the believability" of the witness's testimony. *Id.*

As in *Chandler*, the Ninth Circuit expressly recognized the risk that a jury could infer the potential sentence faced by the defendant from the testimony regarding the witness's mandatory minimum sentence, and that such information could influence the jury's deliberative process, but held that such a risk was outweighed by the defendant's right to expose the bias of a cooperating witness who otherwise would face a mandatory life sentence. *Id.* at 1105.

The Fifth Circuit reached the same result in *United States v. Cooks*, 52 F.3d 101 (5th Cir. 1995). In that case, the defendant was convicted for conspiring to distribute cocaine. *Id.* at 103. The district court allowed cross-examination of a government witness regarding his status as a paid informant and his hopes for leniency on certain charges pending in Texas in exchange for his assistance in the investigation. *Id.* at 103-04. The court disallowed cross-examination about the witness's later arrest in Louisiana for purse-snatching or the severe penalties he faced if convicted on either the Texas or Louisiana charges—which would have amounted to a possible 99-year sentence on the Texas drug charges and a possible 40-year sentence for the Louisiana charge. *Id.* at 103 & n.13.

The Fifth Circuit held that this preclusion of cross-examination violated the defendant's rights under the Confrontation Clause. *Id.* at 104. Citing *Van Arsdall*,

the court held that the preclusion order prevented the jury from learning of important information bearing on the reliability of the witness—namely, his motive to avoid the consequences of his own crimes, "which, given their seriousness and his recidivism, might have been very severe in this case." *Id.* Given the obvious pressure to cooperate with the government, the court found there was a strong incentive for the witness, consciously or unconsciously, to "slant" his testimony. *Id.*

Finally, in *Hoover v. State of Maryland*, 714 F.2d 301 (4th Cir. 1983), the defendant was convicted in Maryland state court of second degree murder, and sought a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Id.* at 302. At trial, an accomplice-turned-government-witness revealed on direct examination that he had received a grant of immunity from prosecution for murder in exchange for his testimony against a murder defendant. *Id.* at 304. When defense counsel sought to inquire on cross-examination whether, as a result of his agreement with the government, the witness expected the prosecutor to intervene on his behalf in other unrelated pending criminal matters, the trial judge refused to permit the witness to be cross-examined about the amount of time in prison he thought he was avoiding by testifying against the defendant. *Id.*

The Fourth Circuit affirmed the order granting habeas corpus, holding that the trial court's refusal to allow inquiry into the witness's understanding of his bargain with the government violated the defendant's right to confront the witnesses against him. *Id.* at 306. The court emphasized that the "vital question, which the defendant is constitutionally entitled to explore by cross-examination, is what the *witness*

understands he or she will receive, for it is this understanding which is of probative value on the issue of bias. The likelihood that a prosecution witness is shading or even contriving testimony adverse to the defendant reasonably can be viewed as directly correlated with the perceived value of such testimony to the witness." *Id.* at 305 (emphasis in original).

B. The First, Second, and Fourth Circuits Have Held That Perceived Concerns Over Jury Nullification Outweigh a Defendant's Constitutionally-Guaranteed Right of Confrontation

The First, Second, and Fourth Circuits have declined to find Confrontation Clause violations in circumstances nearly identical to the above cases. These courts have held—incorrectly, as shown below—that the constitutional right of confrontation is outweighed by the perceived risk of jury nullification.

In *United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997), the defendants were convicted of conspiring to distribute crack cocaine. *Id.* at 357. A number of the government's witnesses had been co-conspirators. The trial court precluded defense counsel from cross-examining these witnesses about the penalties they would have faced absent their cooperation. The Fourth Circuit, splitting with its own decision in *Hoover*, affirmed the district court's order precluding cross-examination on that subject. *Id.* at 358-59. The court based its decision entirely on the concern that the jury might nullify the verdict if it knew the penalties the defendant faced—information it might infer if it knew the witnesses' potential sentences. *Id.* at 358. The court dismissed the defendants' argument that, under *Van Arsdall*, they had a right to confront the witnesses regarding their avoided sentences. *Id.*

The court reasoned that "[a]gainst whatever slight additional margin of probative information gained by quantitative questions, we must weigh the certain prejudice that would result from a sympathetic jury when it learns that its verdict of guilty will result in sentences of ten and twenty years in prison." *Id.* at 359.

The Fourth Circuit in *Cropp*, *id.* at 359, relied heavily on *United States v. Luciano-Mosquera*, 63 F.3d 1142 (1st Cir. 1995), in which the First Circuit held against a right of cross-examination regarding a government witness's potential sentence. *Id.* at 1153. The defendant was convicted of participating in a conspiracy to import cocaine and of firearms violations. *Id.* at 1148. At trial, the district court disallowed the defendant from cross-examining his cooperating co-conspirator regarding the sentence the witness would have faced on firearms counts—35 years in addition to the drug offense. *Id.* at 1153. The First Circuit affirmed the conviction over the defendant's argument that this preclusion order violated the Confrontation Clause. *Id.* Although the court acknowledged the holding in *Van Arsdall*, it concluded that the defendant had a "sufficient opportunity to expose potential biases, including any bias resulting from any benefit [the witness] received as a result of his cooperation" and that "[a]ny probative value of information about the precise number of years [the witness] would have faced had he been charged for the firearms offense was slight" and "outweighed by the potential for prejudice by having the jury learn what penalties the defendants were facing." *Id.*

The Second Circuit, in the case below, reached a similar result. Citing *Luciana-Mosquera*, the court

affirmed Petitioner's conviction over his argument that his Confrontation Clause rights were violated by being denied the opportunity to cross-examine the government's witnesses, his alleged accomplices, regarding the sentences they would have received but for their cooperation. The Second Circuit based its decision entirely on the risk of exposing the jury to "potentially highly prejudicial information regarding both the potential sentences the witnesses would have faced had they been charged and convicted," and the "sentence" Petitioner "actually faced under that statute." (A62.) The court did not even acknowledge this Court's decision in *Van Arsdall*, nor did it discuss the Confrontation Clause concerns that have driven the contrary decisions of other circuits.

II. THE PETITION RAISES IMPORTANT ISSUES CONCERNING THE ROLE OF THE CONFRONTATION CLAUSE IN CRIMINAL TRIALS

A. The Confrontation Clause Plays a Critical Role in Ensuring the Integrity of the Fact-finding Function of Criminal Trials

The Confrontation Clause ensures the criminal defendant the "right . . . to be confronted by the witnesses against him. . . . " U.S. Const., amend. VI. The "main and essential purpose" of the Clause is to secure the opportunity for cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). The Clause commands that the reliability of a witness's testimony "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

This Court has recognized that the "exposure" of a

witness's "motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-317 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). Indeed, the Court has said that cross-examination is the principal means by which the believability of a witness and the truth of the witness's testimony are tested. *Id.* at 316; *see also California v. Green*, 399 U.S. 149, 158 (1970). Cross-examination reveals "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand, . . . and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis*, 415 U.S. at 316 (citation and internal quotation marks omitted).

The Confrontation Clause thus not only tests the recollection and the conscience of the witness, but also "compel[s] him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). The right of cross-examination is more than a desirable rule of trial procedure; it "helps assure the 'accuracy of the truth-determining process'" and is an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

The decisions of the Third, Fourth, Fifth, and Ninth Circuits discussed above all recognize that information concerning the potential sentence that a government witness may avoid by testifying goes to the central issue of credibility and potential bias. As the Fifth Circuit has noted, "[c]ounsel should be allowed great latitude in cross examining a witness regarding his

motivation or incentive to falsify testimony, and this is especially so when cross examining an accomplice or a person cooperating with the Government. . . . Indeed, the right of cross examination is so important that the defendant is allowed to 'search' for a deal between the government and the witness, even if there is no hard evidence that such a deal exists." *United States v. Landerman*, 109 F.3d 1053, 1063 (5th Cir. 1997) (quoting *United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1976)).

The First, Second, and Fourth Circuits have justified their preclusion of defense counsel's cross-examination into a cooperating witness's avoided sentence primarily on the theory that a jury's awareness of the avoided sentence creates a risk of jury nullification based on the sentence the defendant might face. But as this Court has stated, the "denial or significant diminution" of the right to confront and to cross-examine calls into question the integrity of the fact-finding process, and "requires that the competing interest be *closely examined*." *Chambers*, 410 U.S. at 295 (emphasis added). None of the decisions denying the Confrontation Clause right in this context engaged in any "clos[e] examin[ation]" of the nullification risk as against the strong interests in confrontation. As shown below, such an examination readily demonstrates that the concern over nullification is, at best, a perceived policy preference that is supported neither by historical practice nor sound policy and that cannot override the right of confrontation.

B. The Concern Over the Risk of Jury Nullification Is Unjustified

1. The Nullification Concern Is Contrary to the Jury's Historical Role As a Fundamental Constitutional Check on the Powers of Courts and the Other Branches of Government

The concern over possible jury nullification expressed by the First, Second, and Fourth Circuit opinions is contrary to historical precedent. Indeed, this rationale is directly *contrary* to historical practice and policy. During the Founding period, juries were made aware of the sentence that the defendant faced and were given the power to nullify the law through verdict when the sentence was perceived to be too harsh. In this way, juries served as a constitutional check on the powers of courts and prosecutors.

In eighteenth-century England and colonial America, juries were aware of a defendant's potential sentence (most crimes were well known to be capital crimes), and in fact played a critical role in determining that sentence. *United States v. Gaudin*, 515 U.S. 506, 513 (1995). Juries often issued "partial verdicts" or "downvalued" stolen goods in order to avoid death sentences, a widespread practice described by Blackstone as "pious perjury." WILLIAM BLACKSTONE, 4 COMMENTARIES *239 (1769); *see also* J. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55 (1983) (noting that in eighteenth-century England "[t]he jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict").

Historical research shows that both before and after

the ratification of the Confrontation Clause, juries not only were basing their verdicts on potential punishments, but were deciding questions of law. R. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 66 n.148 (2003) (citing e.g., D. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 98-101 (1995)).

As the Court recognized in *Apprendi*, juries during this early period "devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant." *Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000). This reflected the jury's function as a political check on the courts and the other branches of government. The jury's role was to "inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity." Barkow, 152 U. PA. L. REV. at 59; *see also United States v. Powell*, 469 U.S. 57, 65 (1984) (discussing jury's "historic function" to act "as a check against arbitrary or oppressive exercises of power" in upholding inconsistent verdicts).[2] And indeed, lawmakers in the First Congress, which voted on the

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[2] *See also Jones v. United States*, 526 U.S. 227, 245 (1999) ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238-239").

Bill of Rights, recognized this role for the jury. When Congress considered making forgery a capital offense, a prominent argument against adopting the legislation was that juries would not convict. *See* 1 ANNALS OF CONG. 1573-74 (Joseph Gales ed., 1834).

In the nineteenth century, the Court recognized limits on the jury's authority over pure questions of law. In *Sparf v. United States*, 156 U.S. 51 (1895), the Court concluded that "the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." *Gaudin*, 515 U.S. at 513. In addition, there was a general shift at that time away from criminal statutes that established fixed-term sentences to those providing judges with discretion within a permissible range. *Harris v. United States*, 536 U.S. 545, 558 (2002). This change led to the bifurcation of trials, with separate guilt and sentencing proceedings. J. Douglass, *Confronting Death: Sixth Amendment Rights At Capital Sentencing*, 105 COLUM. L. REV. 1967, 2019 (2005).

But these historical developments neither stripped the jury of its constitutional right to apply the law to the facts nor reduced the defendant's rights under the Confrontation Clause. As the Court made clear in its unanimous opinion in *Gaudin*, *Sparf* "in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of law to the facts." *Gaudin*, 515 U.S. at 513. The jury never has been, and is not today, a "mere factfinder." *Id.* at 514. It instead must "apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.*

Recent Court precedent has reaffirmed the central role of the jury as a vital check on the authority of the

courts and other branches of government. In *Apprendi*, the Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. The Court emphasized that the "historical foundation for our recognition" of the right to an impartial jury "extends down centuries into the common law," to "'guard against a spirit of oppression and tyranny on the part of rulers,'" and to serve "'as the great bulwark of [our] civil and political liberties.'" *Id.* at 477. Similarly, in *Blakely v. Washington*, 542 U.S. 296, 305, 313 (2004), the Court held that a Washington state sentencing procedure was unconstitutional under *Apprendi*. The Court reasoned that the jury "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 305-06.

The jury's ability to serve as a critical check on government abuse comes from its power to apply the law to the facts as it sees fit. Some courts, worried that jurors will misuse this power and give insufficient respect to the law as defined by the judge, have sought to limit the information juries receive. For example, courts have refused to inform jurors of their power to nullify the law. These decisions amount to a judicially-created "'don't ask, don't tell' policy regarding nullification." Barkow, 152 U. PA. L. REV. at 68. Some jurists, like Judge Leventhal, have praised this line of authority for striking a "marvelous balance" that allows the jury to act as a "'safety valve' for exceptional cases, without being a wildcat or runaway institution." *United States v. Dougherty*, 473

F.2d 1113, 1134 (D.C. Cir. 1972). Other courts have similarly sought to limit the prevalence of nullification by fashioning rules that prevent the jury from finding out the possible sentencing consequences of their verdict. *See, e.g., United States v. Lewis*, 110 F.3d 417, 422 (7th Cir. 1997) (affirming district court's rejection of defendant's pre-trial request to "advise the jury about the sentencing consequences of a guilty verdict").

Prophylactic measures to limit the jury from discovering information about a defendant's possible sentence, which were adopted as a matter of judicial policy to limit nullification, cannot override the defendant's right to confront an accuser with facts that suggest possible bias. The First, Second, and Fourth Circuits erred in concluding that judicial policy concerns about the possibility for nullification can override clear-cut constitutional rights.

On the contrary, both the jury guarantee and the Confrontation Clause point to the same conclusion in this case, which is to allow a defendant to confront government witnesses about the sentencing discounts they will receive in exchange for testifying. This rule preserves the jury's historic, vital role within our constitutional and political structure as a fundamental check on government power. And it respects the core concern of the Confrontation Clause to allow defendants to cross-examine witnesses about their motives and biases.

Moreover, in this instance, even the judiciary's policy concerns with excessive nullification can be addressed without violating a defendant's constitutional rights. The jury could be instructed to reach its verdict without considering the possible sentence that might be imposed. And it could be instructed that any

information about a witness's potential sentence absent his or her deal with the government should be used solely to evaluate the testimony of the witness and for no other purpose. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987) (observing that jurors are presumed to follow their instructions).[3]

With a limiting instruction in place, it is highly unlikely that information about a witness's potential sentence would trigger nullification. For that to occur, juries in these cases would need to infer that the witness's *perceived* avoided sentence is the same as the actual sentence the defendant faces, and then, on that basis and in disregard of the court's instructions, engage in nullification. It is hardly clear that such an inference can be reasonably expected. Moreover, this risk is also present when jurors know a defendant's possible penalty through other means—for example, because they are lawyers or law students with experience in the area, because they have friends or relatives who have faced similar charges, or they have read news accounts of sentencing. In these instances, these jurors are not stricken, but instead are presumed to follow the judge's instructions on the law. It would be perverse indeed to single out information obtained through a defendant's constitutionally-mandated right to cross-examination as being

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[3] As Petitioner notes, (Pet. 23-26), he is not seeking *certiorari* review with respect to whether criminal defendants possess a categorical right to inform juries of their potential sentences. Rather, he seeks only the significantly narrower right to cross-examine witnesses as to the potential sentences that *they as cooperating witnesses* may have avoided by testifying on behalf of the government. In all criminal cases where the government's case does not rely on cooperating witnesses who themselves may have avoided heftier sentences, the Court's ruling permitting such cross-examination would have no bearing.

uniquely incapable of being controlled through a limiting instruction.

Courts have relied on such limiting instructions in analogous contexts, and there is no reason to treat this area any differently. For example, courts have issued instructions providing that a "co-defendant's guilty plea may be admissible to impeach a government witness," but "may not be considered as evidence of the defendant's guilt." *Unites States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999); *see also Gov't of Virgin Islands v. Mujahid*, 990 F.2d 111, 115 (3d Cir. 1993). In such circumstances, an instruction is "necessary because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant, given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty." *Prawl*, 168 F.3d at 626. If limiting instructions can cure the possibility of jury confusion in the context of a co-defendant's guilty plea, they can also address any concern with nullification.

2. Even If Some Instances of Nullification Might Follow from Revelations About a Cooperating Witness's Plea, This Too Is Consistent with Ensuring the Jury's Central Role In Determining Culpability

Any increase in nullification as the result of defense counsel's cross-examination of cooperating witnesses' avoided sentences is speculative. However, to the extent the possibility of increased nullification exists, that result is still consistent with the Constitution's contemplated role of the jury. The nineteenth-century shift from fixed-term sentences to those providing judges discretion within a set range arguably

diminished the equitable and political need for juries' involvement in sentencing matters. Today, however, there has been a return to fixed-term sentences, with widespread statutory mandatory minimums in crimes involving drugs, sex offenses, and firearms possession, such as those facing Petitioner and the accomplice witnesses who testified against him under 18 U.S.C. § 924(c)(1).[4]

Mandatory minimum sentences are in tension with the need "to create a fair, honest, and rational sentencing system" and "rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently." *Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring). By denying judges "legal power to depart downward, no matter how unusual the special circumstances that call for leniency," statutory mandatory minimums "transfer sentencing power to

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[4] *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006) (increasing mandatory minimums for violent crimes against children, sex trafficking of children, and sexual offenses against children); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (imposing five- and ten-year mandatory minimum terms of imprisonment for possession of certain quantities of crack cocaine); Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984) (requiring imposition of a 15-year prison sentence for an individual with prior serious drug or violent felony convictions); 18 U.S.C. § 924(c)(1) (providing increasing mandatory minimum sentences for firearms use in connection with drug transactions and violent crimes); 21 U.S.C. § 841(b)(1) (prescribing five- and ten-year minimum sentences for various offences of drug manufacture and distribution); 21 U.S.C. § 960(b) (penalizing the importation and exportation of certain drugs by five-and ten-year minimums).

prosecutors, who can determine sentences through the charges they decide to bring . . . ." *Id.*

In this context, the defendant's interest in informing the jury of a potential sentence is greater than in the context of indeterminate sentencing. *See* K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1266 (1995). Under an indeterminate sentencing regime, sentencing discretion is distributed among the legislative, executive, and judicial branches. *Id.* Case-by-case judicial discretion functions as a check on potential executive and legislative branch excesses and helps to assure the fair imposition of laws passed by the legislature. *Id.* Minimum mandatory sentences, by contrast, disrupt this balance by increasing executive branch discretion and decreasing the possibility that a defendant will receive an individualized sentence. *Id.* In these circumstances, the "role of the jury as final protector against governmental overreaching becomes particularly significant." *Id.* at 1266-67.

III. THIS CASE PRESENTS A PROPER VEHICLE FOR THE COURT TO RESOLVE THE IMPORTANT CONFRONTATION CLAUSE ISSUE THAT HAS DIVIDED THE CIRCUITS

This case presents an appropriate vehicle for the Court to resolve the important and recurring Confrontation Clause issue raised by the Petition. As shown above, there is a clear split among the federal circuits. Petitioner squarely raised the issue before the Second Circuit, arguing that the district court violated the Confrontation Clause when it precluded him from cross-examining the government's witnesses about the sentences they avoided by testifying. The

Second Circuit rejected the argument and, relying on *Luciano-Mosquera*, aligned itself with the First and Fourth Circuits' treatment of the issue. Although the Second Circuit's discussion was brief, the issue has been fully vetted by the federal circuits on both sides of the split, including in the *Luciano-Mosquera* case on which the Second Circuit relied.

CONCLUSION

The Center respectfully urges the Court to grant the petition for *certiorari* and reverse the judgment of the Second Circuit.

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